

EXHIBIT 79

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**90 LA 1194
WESTIN HOTEL
Arbitration**

FMCS Case No. 87/23390

May 11, 1988

**In re WESTIN HOTEL [Detroit, Mich.] and HOTEL EMPLOYEES AND RESTAURANT
EMPLOYEES, LOCAL 24**

Arbitrator(s)

Arbitrator: Stanley T. Dobry, selected by parties through procedures of the Federal Mediation and Conciliation Service

Headnotes

ABSENTEEISM

-- Discharge or quit -- Failure to report after leave -- Illness abroad ▶ 116.201 ▶ 118.07 ▶ 118.311 ▶ 118.6366

Employee who became ill in Egypt during scheduled leave and failed to comply with call-in rules was properly terminated, but personnel record is to be amended to reflect "voluntary quit," where employer received telex on day before end of leave, a call from grievant's brother three weeks later, and a call from grievant when he returned shortly thereafter, and second telex was misdirected through no fault of grievant; contract specifies that seniority "shall" terminate unless notice is given "in no event, not more than ten days" after unauthorized absence commences.

Attorneys

Appearances: For the company: Thomas E. Marshall and Ingrid K. Brey (Honigman, Miller, Schwartz & Cohen), attorneys. For the union: Brian S. Mahon, business representative.

Opinion Text

Opinion By:

Stanley T. Dobry

Decision of Arbitrator

UNAPPROVED LEAVE EXTENSION

Stipulated Issue

[The stipulated issue is:]

Was Grievant discharged for just cause? If not, what shall the remedy be?

Relevant Contractual Provisions

"Seniority," Article VIII, Section 70(d) states:

"Seniority rights shall terminate if an employee:

"(a) Quits or retires;

"(b) Is discharged for cause;

"(c) Fails to return to work from an approved leave of absence;

"(d) *Is absent for three (3) consecutive days without notice to the Employer, except in any event where an employee is unable to give such notice to the Employer due to circumstances beyond his control. In such event, the employee shall give notice to the Employer as soon as possible, but in no event, not more than ten (10) days, otherwise his seniority shall terminate.*" [Emphasis added.]

Rights of Employer Rights of Employees," Article XI, Section 86 of the Collective Bargaining Agreement provides in relevant part:

"The employer shall have the exclusive right to operate the business and to control and direct its employees. This right shall include, among other things, the right to hire, promote, layoff, transfer, discipline, discharge . . . provided any decision of the Employer which is contrary to or in violation of the specific provisions of this Agreement shall be subject to the grievance procedure. *The Employer may establish rules and regulations governing employees but such rules shall not be in violation of this Agreement.*" [Emphasis added.]

"Grievances -- Arbitration" Article IX ¹ states in part:

¹ The Employer's citation to Article VII, Section 65 is inapplicable, as it relates to arbitration of pension disputes only.

"75. If any grievances arise under the terms and provisions of this Agreement, the

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employees affected may, either directly or through the shop steward or representative of the Union, take the matter up with the Hotel in an effort to effect a satisfactory settlement. . . .

"78. The arbitrator shall be mutually acceptable to the parties. If the parties cannot themselves agree upon an arbitrator, either party may request a list be furnished by the Federal Mediation and Conciliation Service and the parties shall select an arbitrator mutually acceptable from such list within two (2) weeks after such list is furnished to the parties. . . . The decision of the arbitrator shall be final and conclusive upon both parties and both parties agree to abide by the award of the arbitrator. The fees and expenses of the arbitrator shall be shared equally between the parties.

"79. *An arbitrator shall not have any authority to subtract from or modify the terms and provisions of this Agreement. . . . Any back pay award rendered by an arbitrator shall be reduced by interim earnings of any sort, unemployment compensation and any period during which the recipient failed to attempt to mitigate wage loss.*" [Emphasis added.]

Company Rules from the Employee Handbook

"Attendance/Call-in Policy:

"The success and smooth running of an operation depends to a great extent on your being at work on time each day you are scheduled. If you are absent or even late in reporting to work, you place an extra burden on the hotel, and more especially, on your fellow employees. If a situation arises which makes it impossible for you to report to work for any reason, you are expected to notify your immediate supervisor personally at least two hours in advance of your shift reporting time or as soon as you determine you will be late or absent. You should explain the reason for your absence and when you expect to return to work. If you are unable to reach your supervisor, call the hotel assistant manager at 568-8380 and leave a message with them. Be sure to tell them the following:

- "1. Your name and department.
- "2. Date and time you were scheduled to be at work.
- "3. Your reason for not being able to report to work.
- "4. When you expect to be able to return.
- "5. A phone number where you can be reached.
- "6. Be sure to receive from the assistant manager a call off number.

Then call back later or continue to call back until you reach your supervisor and confirm that the message

was received.

"Since you are held responsible for the proper notification of absences to your supervisor, do not depend on friends, relatives or fellow employees to report your absence for you. Absences of more than one day must be reported daily unless other arrangements have been made with your supervisor. Absences due to an illness for more than one week require our approved medical leave of absence. A doctor's release to return to work will be requested by Personnel after repeated or extended absences. *Any employee who fails to report for work without calling in as outlined above for three consecutive days will be removed from our payroll as a voluntary quit.*" [Emphasis added]

Operative Events

For five years, Victor Makar was employed "off and on" as a Food and Beverage Cashier by the Westin Hotel facility at the Renaissance Center in Detroit, Michigan. His most recent employment commenced October 11, 1984.

In March of 1987, Mr. Makar asked his supervisor, Mr. Jeff Coates, for a vacation beginning Wednesday May 6, and ending Sunday, May 24, 1987. The requested period is one of peak activity and occupancy for the hotel. At the time of the request, Makar had only one week of accrued vacation, time, and the balance would be taken as unpaid personal leave. Coates granted only the first two weeks, so Makar was scheduled to return to work on May 18.

Mr. Makar traveled to Egypt, where he visited his family, staying with an aunt. About ten days into the trip, he became ill and bedridden. He declined to be hospitalized because he feared unsanitary conditions. According to a note Makar provided from Dr. Victor P. H. Michail, he was "under my care from 5/14/87 through 6/3/87 for acute amoebic dysentery and food poisoning. The above dates covers treatments plus recuperations. If any questions regarding his illness please feel free to contact me."

It is undisputed that Makar never telephoned the Westin Hotel to advise of his condition or whereabouts.

Instead, on Saturday, May 16, the day before the vacation was supposed to end, Makar directed one of his aunt's servants to send a telex to the Westin. It was sent from the El Salam Hyatt, and read in toto:

"Sorry, but I couldn't make it home in time because I got ill and couldn't fly by doctor' orders. I will bring you a letter stating my illness from the doctor, hopefully, he will let me fly out next week and if not, I will send you another telex."

On May 16, Supervisor Coates received the telex. On Friday, May 22, Makar required the servant to send a second telex, this time from the Sheraton Heliopolis. It said:

"The doctor will still not let me fly out due to my illness. Will keep you posted. Victor."

The second telex was misdirected to a firm in Massachusetts, which had just acquired the Westin's old telex number. As explained by the Cairo hotel, the new Globe Telex Worldwide

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Directory had not been timely received. ²

² "We are in receipt of a copy of telex which was forwarded to us by Ms. Nancy Lawrence, Consumer Affairs Representative, The Sheraton Corporation in Boston dated June 24th, 1987, relating your problem with your reservation in the Westin Hotel in Detroit.

"We had already dispatched a telex . . . to Ms. Lawrence explaining the situation i.e. the Globe Telex Worldwide Directory for 1986/87 was only received a few days ago (such delays are not uncommon in our part of the world). Hence our Telex Operator referred to the number of Westin as indicated in the Directory we had in hands 1985/86 (in all good faith and with no means to know that the Westin Telex number had changed).

"We do certainly understand your grievances and appreciate the inconvenience this situation must have caused you. However please do understand that this was indeed beyond our control and no mistake was ever intended.

"We have no other alternatives but to call on your understanding and do please accept our sincere apologies for inconveniences caused to you. We are right now writing the Globe Telex Directory asking them to ensure prompt courier service dispatch of their publication to avoid such errors in the future.

"We will be looking forward to your next stay at the Heliopolis Sheraton and to the pleasure of being of

better service to you, we remain, Sincerely Yours, . . ."

On May 28, Coates advised Human Resources Assistant Director Dorothy Smiley that it appeared Makar had abandoned his job by failing to comply with the call-in policy. Makar's position was immediately filled.

On June 1, Smiley sent a certified letter to Makar's home directing him to contact the Westin immediately. The letter was returned after three failed delivery attempts.

On June 2, Mr. Makar's brother, who had returned from Cairo May 30, called the Westin and advised that Grievant "should be back" to the States on June 6 or 7.

On Saturday, June 6, Mr. Makar arrived in New York. He contacted the Westin, said he had just gotten back from Egypt, and asked to speak to his supervisor. The supervisor was unavailable, so he was told to contact the manager the next day.

Makar went to the Westin on Sunday, and was informed no managers were available. He telephoned Coates that evening, and was told to meet with Smiley.

On June 8, Makar attempted to return to work. There was an extensive interview with Smiley, with union representatives present. At that time Makar presented a copy of the doctor's note and the May 22 telex, and pointed out the telephone calls from his brother. According to Smiley, Grievant failed to respond to requests for justification of his not calling. Instead, he made some remarks about his previously being denied a position unfairly. Smiley concluded that Makar had not done all he could to mitigate the situation, and confirmed that he had received a copy of the employee handbook. After discussing the matter with Makar, she gave him a notice indicating he had been terminated for "job abandonment." According to Makar, Ms. Smiley said she would see what she could do about his termination.

After two weeks of attempting to contact Ms. Smiley, Makar was informed there was no change in his status: he was to remain discharged.

On June 11, a grievance ³ was filed which alleged:

³ The parties agree that this matter is properly before the arbitrator.

At the close of the proofs, Grievant was given a chance to add any further statements he wanted to the record. In response to the arbitrator's questions, he said he felt he had a full and fair opportunity to be heard, and that he was satisfied the Union had done everything it could for him.

"I, Victor Makar, went on vacation on May 3rd - May 17th. During the middle of my vacation I got sick and had sent to the Westin two telexes from Cairo, Egypt, one being from the Hyatt which they received, the second being from the Sheraton for which they have not received [and] which I have copies and gave them the original.

"When my brother had gotten back on the 30th of May he had called them and contacted the hotel but no one has even bothered to call him back.

"After my arrival on the 6th of June I had called my manager and was told to contact Human Resources, Dorothy Smiley.

"I would like to be reinstated with full back pay."

Positions of the Parties

The Employer: There was just cause to terminate Grievant's employment. The employer exercised its contractual right to establish rules, which require absent employees to make contact with their supervisor. No one has challenged the authority of the Westin to adopt such a policy.

The labor agreement unambiguously specifies that employees who fail to make contact for three days lose their seniority, unless the employee's failure is due to circumstances beyond his control.

Because of his prior disciplinary history ⁴, Grievant was well aware of the rule and its requirements.

⁴ Mr. Makar was orally reprimanded for failing to call or report for his shift on July 22, 1986. He was suspended for one day for failing to call or report on September 12, 1986. At this time, Mr. Coates advised Makar that any further infractions of this policy could result in termination.

Once the fact of noncontract is established, the burden shifts to the employee

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to prove the failure to report the absence was "due to circumstances beyond his control."

Sending a telex was no satisfactory substitute for telephoning. It did not state the nature of Grievant's illness, its severity, the expected date of return, or how Grievant could be contacted. Grievant's claim that telephone calls were too expensive is opposed by his admission that the telex cost as much. Grievant admitted further that he was not too ill to use his aunt's phone.

In sum, the only communication from Grievant was one telex, and there was no phone call for 22 days following Grievant's scheduled return from his vacation.

Arbitrators have consistently upheld discharges involving similar contracts and situations. See *Great Lakes Container Corp.*, 84 LA 451 (Madden, 1985); *Boyle-Midway, Inc.*, 70 LA 963 (Traynor, 1978); *Weyerhaeuser Co.*, 83 LA 365 (Shearer, 1984); and *ITT General Controls*, 76 LA 1258 (Bickner, 1981).

Grievant's testimony was incredible, contradicting other physical evidence and itself.

The arbitrator has limited authority, and cannot substitute notions of "fairness or equity" for the literal words of the contract. The arbitrator is expressly forbidden from *modifying*, deleting or altering the agreement's terms -- these terms directly set forth standards that require termination of Grievant's seniority and employment.

If it is determined the discharge was improper, Grievant forfeited any back claim, since his enrollment as a full time student was a failure to mitigate damages.

Therefore, Grievant was discharged for just cause, and the grievance ought to be DENIED.

The Union: The issue is whether Grievant notified the employer of his illness to the best of his ability. Victor Makar complied with the requirements of Article VIII, Section 70(d), so that his seniority should not be terminated.

The existence of the two telex messages is undisputed; the misdirection of the second telex, due to a change in telex numbers, is also uncontroverted. Grievant's choice of a telex, instead of telephoning, was logical. A telex ordinarily would be received the same day. International telephone calls in Cairo take three days to place.

Mr. Makar testified that Air Egypt airline only departs Egypt on Fridays and Saturdays, and that he left on the first available flight after his recovery.

The prior disciplinary history establishes that Grievant is a good employee, receiving only two warnings in five years. In both instances, his failure to report for work or call was due to misreading the work schedule.

Application of the company's attendance policy is unreasonable. While the rule makes sense under ordinary circumstances, this involved transcontinental travel and illness, two circumstances out of the ordinary, and requiring daily reporting is patently absurd. Grievant substantially complied with the rules as he understood them.

In conclusion, Grievant did the best he could to keep the employer aware of his status. He used the most effective means of communication, given the realities of Third World conditions. For these reasons, the Administrative Law Judge determined that he was not disqualified by "misconduct" from receiving unemployment benefits. The Arbitrator should make the same determination, based upon the contract. ⁵

⁵ The Michigan Employment Security Commission notice stated: "Claimant requested a redetermination of the determination issued 7/14/87 which disqualified him. A review of the commission's records revealed claimant became ill while on vacation. He notified the employer of his illness by telephone. There is nothing in the records to substantiate that claimant abandoned his job. In view of this, the determination of 7/14/87 is reversed.

"Claimant is not disqualified for benefits due to misconduct."

Therefore, the Grievance should be GRANTED and Grievant be reinstated to his employment forthwith with full back pay, benefits, and seniority. Further, any references in his personnel file to this discharge and discipline

should be expunged.

Discussion

The arbitrator has reviewed the cited cases. Principles considered important have been applied. However, precedents have limited usefulness. The parties contracted for this arbitrator's judgment based on his interpretation and application of the contract to the facts established on this record.

Likewise, the determination of the Michigan Employment Security Commission is not binding.

That document was admitted over the objection of the employer, because

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the arbitrator believes that labor arbitration should be an informal process, where the rules of evidence ought to be applied primarily as they relate to weight, rather than admissibility.

However, receiving the document in evidence does not require the arbitrator to blindly adopt its conclusion. There evidently were differences in the two records. Clearly, there are substantial differences in the definition of "misconduct" under the unemployment compensation law and that of a labor agreement. The first has a statutory basis; the second should be drawn from the contract and the relationship of the parties. Further, it is possible for there to be contractual cause for termination, unrelated to any statutory misconduct by the employee.

The contract permits the employer to adopt rules, and those rules specifically require direct telephone communication. They are reasonable on their face, and have several salutary purposes: (1) they give the employer the ability to schedule work with an adequate labor force; and (2) they protect the employee, establishing a protocol to verify unexpected absences. This case, however, does not turn upon the application of disciplinary rules.⁶

⁶ On the other hand, the contract itself does not require a telephone call, but simply requires "notice." Grievant's attempted use of a telex was not prohibited, although it did not comply with the rule regarding contents of the communication. I make no determination as to the disciplinary application of that rule.

rather, it focuses on contractual seniority loss.

The contract speaks to all who will hear that employees have a duty to notify the employer if they are not reporting for work. Pointedly, "Seniority," Article VIII, Section 70(d) states: "Seniority rights shall terminate if an employee . . . Is absent for three (3) consecutive days without notice to the Employer, except in any event where an employee is unable to give such notice to the Employer due to circumstances beyond his control. *In such event, the employee shall give notice to the Employer as soon as possible, but in no event, not more than ten (10) days, otherwise his seniority shall terminate.*"⁷ [Emphasis added.]

⁷ Likewise, the disciplinary rules state: "Any employee who fails to report for work without calling in as outlined above for three consecutive days will be removed from our payroll as a voluntary quit."

Grievant sent his first telex on May 16, and that notice was received by the employer. The second telex was never received. The next notice actually received by the employer was on June 2, more than two weeks later.

The reasons for nondelivery of the second telex seem to be beyond Grievant's control.

However, this fact does not change the result. In the emphasized language, the parties specifically considered this kind of possibility, and gave the employee a maximum of ten days to give notice, irrespective of the circumstances, "otherwise his seniority shall terminate." The word "shall" is mandatory. The limitations on the arbitrator's authority preclude me from changing or ignoring it, or inserting an exception for further extraordinary circumstances. In short, the contractual burden of effectuating notice is on the employee; the employee bears the risk of loss if he fails to communicate for more than ten days.

Additionally, the evidence offered on behalf of the Grievant is equivocal at best, and incredible at worst.

(1) Grievant testified several times on cross examination that his brother planned to return to the United States one week after Grievant planned to return. Grievant's brother left Egypt May 30, and under this scenario Grievant planned to leave May 23, seven days after his leave expired. When this contradiction was pointed out, he changed his testimony to state he was scheduled to leave two weeks before his brother.

(2) The failure to produce any supporting documentation, such as airline tickets, trip itinerary, etc., is telling, particularly since he was so meticulous in marshalling documentation about the second telex.

Nevertheless, Grievant's credibility is not decisive. He simply failed to give notice to the employer far too long after his leave ended. Under the contract, his seniority terminated automatically, irrespective of his intent or ineffectual attempts to communicate.

AWARD

For the preceding reasons, the first part of the stipulated issue is answered "Yes." However, Grievant's personnel record will be amended to show him as a voluntary quit under the terms of Article VIII, Section 70 (d).

In all other respects, the Grievance is DENIED. I retain no further jurisdiction.

- End of Case -

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ISSN 1527-7356

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